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No. 80-644

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

G.D. SEARLE & CO.,
Petitioner,

v.

SUSAN COHN AND WALTER COHN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

MOTION OF RESPONDENTS FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF

WALTER R. COHN,
15 Valley Street
South Orange, New Jersey 07079
(201) 762-6444
Attorney for Respondents

On the Brief:

THOMAS E. COHN, ESQ.
15 Valley Street
South Orange, New Jersey 07079
(201) 762-6444

The Superior Appellate Printing Company, Cranbury, NJ 08512

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Oral argument was held in the above captioned matter on December 7, 1981 before the United States Supreme Court. At that time, as a result of new matter raised in the Reply Brief of the Appellant-Defendant and as the further result of questions posed by the members of the Court, the issue of the degree of difficulty involved for a foreign corporation to obtain representation in the State of New Jersey arose. Pursuant to the Rules of the Supreme Court, *R.* 35.5 and *R.* 35.6, Respondents herein move to file supplemental materials having a bearing on one aspect of the within lawsuit.

During the oral argument of this matter, certain questions were posed by the members of the Court addressed to the Commerce Clause issue, and more specifically, to the issue of what burdens may or may not be involved for a foreign corporation to designate a New Jersey representative to accept service of process and yet not subject that foreign corporation to the requirements of obtaining a Certificate of Authority nor incur other so-called "burdens" which may arise when a foreign corporation has not otherwise qualified to do business in New Jersey.

In response to the question of Justice O'Connor, Counsel for Appellant-Defendant stated that in order for a foreign corporation to appoint an agent, it would also be required to file reports and pay franchise taxes in New Jersey. Additionally, Counsel stated that no New Jersey cases and no New Jersey statutes were applicable to the particular topic. This statement is clearly erroneous, as will be demonstrated below. Additionally, it is important to note that the filing of this Supplemental Brief is warranted by the fact that the so-called "burdens" attendant to designating an agent in the State of New Jersey had not been briefed nor decided below in either the Federal District Court for the District of New Jersey or the Third Circuit Court of Appeals. This one very narrow issue arose initially during the Supreme Court proceeding.

Thus, because the specific issue raised during oral argument was not accurately presented at the time and further due to the fact that the specific issue was not briefed nor decided by the Federal District Court nor the Third Circuit Court of Appeals, the Respondents hereby move to file this Supplemental Brief, including New Jersey Statutes and practice forms of the Division of Taxation.

Respectfully submitted,

WALTER R. COHN
Attorney for Respondents-
Plaintiffs

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SUPPLEMENTAL BRIEF OF RESPONDENTS

ARGUMENT

I

Pursuant to the laws of the State of New Jersey, a foreign corporation which has not otherwise qualified to do business in the State of New Jersey, may designate an agent for the purpose of receiving service of process and yet, in its annual filing report, elect to disclaim any and all liability for franchise taxes to the State of New Jersey.

During oral argument on December 7, 1981, the issue arose as to the degree of difficulty for a foreign corporation to obtain representation in New Jersey. Counsel for Petitioner-Defendant stated that by designating an agent for purposes of service of process, thereby creating a representation within the State of New Jersey so as to receive the privilege of the benefit of the Statute of Limitations, and without doing anything further, a foreign corporation was fully liable for payment of franchise taxes to the State of New Jersey. Petitioner-Searle contended that this constituted a burden on interstate commerce. During oral argument, Respondents stated that the issue had never been raised prior to the submission of the reply brief by the Appellant-Defendant. The New Jersey Statute which authorizes the filing of the business activities report of a foreign corporation was also alluded to during oral argument.[1]

Petitioner qualifies as a foreign corporation required to report under this statute because it does business in New Jersey aggregating in excess of twenty-five thousand dollars a year. In oral argument, Searle advanced the position that it would be subject to franchise taxes if it designated a representative in New Jersey. *N.J.S.A.* 14A:13-19 proves the contrary is true by providing that a foreign corporation may disclaim any and all liability for the payment of the Corporation Business Tax and the Corporation Income Tax. See Appendix A, Section 1. On the Notice of Business Activities Report by a Foreign Corporation form, near the bottom of the form, just above the certification of an authorized officer of the corporation, is the section by which a foreign corporation may disclaim all liability for the payment of franchise taxes to the State of New Jersey.

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[1]The reporting form provided by the New Jersey Division of Taxation constitutes the above-mentioned Notice of Business Activities Report by a Foreign Corporation in accordance with the Statutes, *N.J.S.A.* 14A:13-15 et. seq. This statute has been upheld by the New Jersey Courts as a valid means for gathering information to determine whether or not state taxation is appropriate. *Associates Consumer Discount Company v Bozzarello*, 149 N.J. Super. 358 (App. Div. 1977).

Contained in Appendix A, Section 2, is *N.J.S.A.* 14A:13-19 in which the New Jersey State Legislature empowers the Director of the Division of Taxation to prepare and circulate a form which permits the disclaimer of liability for the payment of franchise taxes.

The New Jersey Statute mentioned above and the New Jersey Practice form enclosed as Appendix A, Section 1, undeniably refute the contentions of Petitioner that a corporation must pay franchise taxes in the State of New Jersey if it designates an agent for purposes of service of process. To the contrary, a foreign corporation will not be subject to franchise taxes in the State of New Jersey if it elects to not pay them, even though it has designated a representative for purposes of service of process. Therefore, a foreign corporation in no way subjects itself to any burdens sufficient to constitute a commerce clause violation, (See *Breard v City of Alexandria, La.*, 341 U.S. 622, Rehearing denied; 342 U.S. 843 (1951); and *Nippert v Richmond*, 327 U.S. 416 (1946),) solely as the result of the designation of an agent to receive service of process. A foreign corporation may designate an agent for purposes of service of process in New Jersey and thereby obtain the benefit of the Statute of Limitations, still not qualify to do business, and still not be required to pay franchise taxes in New Jersey. This negates the contention of Petitioner in its search to create "burdens" which it claims arise as the result of a foreign corporation's minimal contacts with the government of the State of New Jersey.[3]

Respectfully submitted,

WALTER R. COHN
Attorney for Respondents-
Plaintiffs

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[3] See also *Velmohos v Maren Engineering Corp.*, 83 N.J. 282 (1980), footnote 10 of the decision of Justice Pashman.

See also the December 3, 1981 letter-memorandum of Plaintiffs which makes reference to Forms for the Registration of a Fictitious Name by a Foreign or Domestic Corporation, pursuant to *N.J.S.A.* 14A:2-21, all of which Respondents incorporate by reference as though set forth in full herein.

APPENDIX

Appendix A
Section I

STATE OF NEW JERSEY
DIVISION OF TAXATION

NOTICE OF BUSINESS ACTIVITIES REPORT
by a FOREIGN CORPORATION
(P.L. 1973, c. 171)

FOR CALENDAR YEAR 19 ____

or other taxable year beginning _____, 19 _____, and ending _____, 19 _____

DUE DATE: File on or before the fifteenth day of the fourth month after the close of the Calendar or Fiscal year.

The following-named corporation, organized under the laws of the State of _____ does hereby make the following Report in compliance with the provisions of Section 2, Chapter 171, Laws of 1973 of the New Jersey Statutes, as the same may be amended.

PRINT OR TYPE

NAME	FEDERAL IDENTIFICATION NO.
ADDRESS (NUMBER AND STREET OR RURAL ROUTE)	STATE OF INCORPORATION
CITY, TOWN OR POST OFFICE AND STATE ZIP CODE	DATE OF INCORPORATION

PLEASE READ INSTRUCTIONS ON THE BACK OF THIS FORM

1. Principal Type of Business _____

2. Location of Principal Office _____

3. OFFICES AND OTHER PLACES OF BUSINESS IN NEW JERSEY

Location	Nature of Activity

4. OFFICERS, EMPLOYEES, AGENTS AND REPRESENTATIVES IN NEW JERSEY (attach fully descriptive duty statement for each officer and each class of employee, agent or representative)

Title	Number of Persons

DID THE CORPORATION DURING THE PERIOD COVERED BY THIS REPORT:

5. Own or lease real property in New Jersey? _____ Yes _____ No _____

6. Own or lease tangible or intangible personal property in New Jersey? _____ Yes _____ No _____
If "Yes", explain _____

7. Employ any other assets in New Jersey? _____ Yes _____ No _____
If "Yes", explain _____

8. Own merchandise located in New Jersey for sale? _____ Yes _____ No _____

9. Own assets located in New Jersey which are leased to others? _____ Yes _____ No _____
If "Yes", explain _____

10. Perform any construction, erection, installation or repair work or other services in New Jersey? _____ Yes _____ No _____
If "Yes", explain _____

11. Receive payments from persons residing in or businesses located in New Jersey aggregating in excess of $25,000? _____ Yes _____ No _____
If "Yes", explain _____

12. Derive income from any source or sources within New Jersey? _____ Yes _____ No _____
If "Yes", explain _____

Does the corporation disclaim liability under the Corporation Business Tax Act (N.J.S.A. 54:10d-j, et. seq.) or the Corporation Income Tax Act (N.J.S.A. 54:10E-1, et. seq.) and any obligation to obtain a certificate of authority to do business in this State? _____ Yes _____ No _____
If "Yes" explain _____

CERTIFICATION OF AN AUTHORIZED OFFICER OF THE CORPORATION

I hereby certify that this report, including any accompanying rider, is to the best of my knowledge and belief, a true, correct and complete report.

SIGNATURE OF OFFICER OFFICIAL TITLE DATE

CBA-1 (10-73)

THIS REPORT SHALL BE FILED WITH:

State of New Jersey
Division of Taxation
Audit Activity
West State and Willow Streets
Trenton, New Jersey 08625

GENERAL INSTRUCTIONS

1. Chapter 171 Laws of 1973 provides that every foreign corporation except corporations exempt pursuant to paragraph 2 of these instructions, must file a Notice of Business Activities Report on Form CBA-1 if:

   (a) Such corporation has not obtained a certificate of authority to do business in New Jersey and is not "doing business" in this State in the traditional franchise tax sense, but, nevertheless, is deriving income from sources within this State; or

   (b) Such corporation disclaims liability for the Corporation Business Tax or the Corporation Income Tax and any obligation to obtain a certificate of authority to do business in this State.

2. A foreign corporation is exempt from the requirement of filing a Notice of Business Activities Report if:

   (a) By the end of its accounting period for the preceding calendar or fiscal year it had received a certificate of authority to do business in New Jersey issued by the Secretary of State or any other agency of this State; or

   (b) Files a timely return under the Corporation Business Tax Act or the Corporation Income Tax Act for such calendar or fiscal year.

3. Activities or property maintenance in New Jersey which require foreign corporations to file a Notice of Business Activities Report are:

   (a) The maintenance in this State of an office or other place of business (such as warehouses and terminals); or

   (b) The maintenance of personnel in this State including the presence of employees, agents, representatives or independent contractors in connection with the corporation's business, even though not regularly stationed in this State; or

   (c) Ownership or maintenance of real and tangible personal property directly used by the corporation in this State; or

   (d) Ownership or maintenance of tangible and intangible property in this State employed by others, such as leased equipment, licensed patents, trademarks, trade names and franchised businesses; or

   (e) Receipt of payments from persons residing in this State, or businesses located in this State, aggregating in excess of $25,000, regardless of any other connections with this State; or

   (f) The derivation of income from any source or sources within this State; or

   (g) Any other activity or property in, or interrelationships with, this State.

Appendix A

Section II

14A:13-15. Notice of business activities report; necessity; filing; activities or property maintenance covered

Every foreign corporation which during any calendar or fiscal accounting year ending after December 31, 1973, carried on any activity or owned or maintained any property in this State, unless specifically exempted under section 3 of this act,[1] shall be required to file a notice of business activities report, as hereinafter provided.

Activities or property maintenance in this State which require corporations to file this report are:

a. the maintenance in this State of an office or other place of business; or

b. the maintenance of personnel in this State, including the presence of employees, agents, representatives or independent contractors in connection with the corporation's business, even though not regularly stationed in this State; or

c. the ownership or maintenance of real and/or tangible personal property directly used by the corporation in this State; or

d. the ownership or maintenance of tangible and/or intangible property in this State which is used by others; or

e. receiving payments from persons residing in this State, or businesses located in this State, aggregating in excess of $25,000.00 regardless of any other connections with this State; or

f. the derivation of income from any source or sources within this State; or

g. any other activity or property in, or interrelationships with, this State as designated by the director.

L.1973, c. 171, §2, eff. June 7, 1973.

14A:13-16. Exemptions

A foreign corporation shall not be required to file a notice of business activities report if

a. by the end of an accounting period for which it was otherwise required to file a notice of business activities report under this act, it had received a certificate of authority to do business in this State; or

b. a timely return has been filed under the Corporation Business Tax Act[1] or the Corporation Income Tax Act[2] for such accounting period.

L.1973, c. 171, §3, eff. June 7, 1973.

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[1]Sections 54:10A-1 to 54:10A-32.

[2]Sections 54:10E-1 to 54:10E-24.

Date of application, see note under §14A:13-14.

14A:13-19. Forms; certification

The director shall design a form of report and forms for such additional statements or schedules as he may require to be filed therewith. Such form shall contain a provision in which the foreign corporation may disclaim liability for the corporation business tax and the corporation income tax, and any obligation to obtain a certificate of authority to do business in this State and shall provide for the setting forth of such additional facts as the director may deem necessary for the proper enforcement of this act. He shall cause a supply thereof to be printed and shall furnish appropriate blank forms to each corporation upon application or otherwise as he may deem necessary. Failure to receive a form shall not relieve any corporation from the obligation to file a report under the provisions of this act. Each such report shall have annexed thereto a certification by the president, vice president, comptroller, secretary, treasurer, assistant treasurer, accounting officer of the corporation or any other officer of the corporation duly authorized so to act to the effect that the statements contained therein are true. The fact that an individual's name is signed on a certification of the report shall be prima facie evidence that such individual is authorized to sign and certify the report on behalf of the corporation. In the case of a corporation in liquidation or in the hands of a receiver or trustee, certification shall be made by the person responsible for the conduct of the affairs of such corporation.
L.1973, c. 171, §6, eff. June 7, 1973.